

1                                   **IN THE UNITED STATES DISTRICT COURT**  
2                                   **IN AND FOR THE DISTRICT OF NEVADA**

3                   CASUN INVEST, A.G., a Swiss corporation,  
4

5                                   Plaintiff,

6                                   vs.

7                   MICHAEL H. PONDER, an individual; LEZLIE  
8                   GUNN, an individual; and NVWS PROPERTIES  
9                   LLC, a Nevada limited liability company,

10                                   Defendants.

Case No. 2:16-cv-02925-JCM-GWF

**FINDINGS OF FACT and  
CONCLUSIONS OF LAW**

11                   These Findings of Fact and Conclusions of Law are based upon the stipulations of the  
12                   parties, the evidence presented at the trial of this matter from May 9, 2022, through May 11, 2022,  
13                   and the parties' post-trial briefings. Any and all findings of fact set forth herein shall constitute  
14                   findings of fact even if stated as conclusions of law, and any and all conclusions of law set forth  
15                   herein constitute conclusions of law even if stated as findings of fact.

16                                   **FINDINGS OF FACT<sup>1</sup>**

17                   The court hereby finds as follows:

- 18                   1.       Plaintiff Casun Invest AG ("Casun") is incorporated in Switzerland, with its  
19                   principal place of business in Switzerland.
- 20                   2.       Defendant Michael H. Ponder ("Ponder") is a resident of Nevada.
- 21                   3.       Defendant Lezlie Gunn ("Gunn") is a resident of Nevada.
- 22                   4.       Defendant NVWS Properties LLC ("NVWS") is incorporated in Nevada with its  
23                   principal place of business in Nevada.

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25                   <sup>1</sup> The court enters these findings of fact based on a preponderance of the evidence. In assessing  
26                   the credibility of witnesses, the court has considered the source and basis of each witness's  
27                   knowledge; the ability of each witness to observe; the strength of each witness's memory; each  
28                   witness's interest, if any, in the outcome of the litigation; the relationship of each witness to either  
side in the case; and the extent to which each witness's testimony is either supported or  
contradicted by other evidence presented at the trial.

- 1           5.     At all times relevant to this matter, Hans-Peter Wild was Casun's sole shareholder.
- 2           6.     At all times relevant to this matter, Hans-Rudolf Wild was Casun's sole board
- 3 member.
- 4           7.     On November 16, 1992, a grant deed was recorded in the official records of the
- 5 County of San Mateo, California, conveying title to the property commonly known as 140 Josselyn
- 6 Lane, Woodside, California 94062 (APN 072-112-030) ("the property") from Calvin F. Gunn, an
- 7 unmarried man, to Casun.
- 8           8.     On December 2, 1992, Karen A. Kangas—a/k/a Karen A. Gunn—executed a
- 9 quitclaim deed, quit claiming any interest she held in the property to Casun. That quitclaim deed
- 10 was recorded in the official records of the county of San Mateo, California on December 7, 1992.
- 11           9.     Approximately ten years after Casun purchased the Woodside Property, Calvin
- 12 Gunn initiated litigation against Casun and Dr. Wild, claiming a life estate and an option to
- 13 repurchase the Woodside Property based on an alleged oral agreement.
- 14           10.    On August 28, 2002, Ponder was appointed as a *direktor*—someone selected and
- 15 authorized by the board of directors to act on behalf of the corporation—for Casun to serve as its
- 16 corporate representative in that lawsuit.
- 17           11.    Ultimately, Casun and Dr. Wild prevailed in the Calvin Gunn Litigation because
- 18 Calvin Gunn was unable to produce a writing documenting the interests he claimed in the
- 19 Woodside Property.
- 20           12.    Ponder was removed as Casun's *direktor* on March 21, 2013, and reappointed on
- 21 March 28, 2013, effective on April 9, 2013.
- 22           13.    As *direktor*, Ponder had the authority to execute documents, including grant deeds,
- 23 on Casun's behalf.
- 24           14.    In late March of 2013, Gunn and Hans-Peter Wild agreed that Casun would transfer
- 25 the property to Gunn at a purchase price of at least \$2,050,000.
- 26           15.    Between March 26, 2013, and March 28, 2013, Gunn organized three Nevada
- 27 limited liability companies: 1) Woodside Gate LLC, managed by Gunn and Ponder; 2) NVMS
- 28 Properties LLC ("NVMS"), managed by Gunn; and 3) NVWS, managed by NVMS.

1           16.     On March 31, 2013, Hans-Peter Wild agreed to give Gunn \$2,100,000 so that Gunn  
2 could purchase the property from Casun for \$2,050,000.

3           17.     On March 31, 2013, Hans-Peter Wild sent an email to Hans-Rudolf Wild, Casun's  
4 sole board member, copied to Ponder, stating:

5                     Dear All,

6                     We have an offer for the house at market price and I think we should sell.

7                     Mike you have the details and please execute the sale with [Hans-Rudolf]  
8 Wild. The house is sold as is and we only need to transfer the title.

9                     Best regards

10           18.     Because he had been released as a *direktor* of Casun ten days earlier, Ponder did  
11 not have the ability to transfer the property on March 31, 2013.

12           19.     In early April, Gunn and Ponder prepared a series of emails to be sent to Jan-  
13 Michael Clauss ("Clauss"), Casun's legal counsel, regarding Ponder's removal as a *direktor* of  
14 Casun.

15           20.     At the same time, Gunn and Ponder prepared a series of emails to be sent to Hans-  
16 Rudolf Wild.

17           21.     On April 3, 2013, Ponder sent an email to Hans-Rudolf Wild, stating: "Please  
18 transfer the property from Casun to NVWS Properties, LLC as directed by Dr. Hans Peter Wild's  
19 message of March 31, 2013."

20           22.     On April 5, 2013, Ponder sent an email, as revised by Gunn, to Hans-Rudolf Wild,  
21 requesting that Hans-Rudolf Wild acknowledge and confirm receipt of Ponder's email of April 3,  
22 2013.

23           23.     Hans-Rudolf Wild responded to Ponder's email minutes later, stating:

24                     I have received Dr. Hans Peter Wild's email a couple of days ago but I did  
25 neither receive your message of 3rd March 2013 nor any further documents.

26                     I accept that the matter has high priority. However I have no idea how to  
27 prepare transfer documents for real estate in the US and to be honest I have  
28 not received any documents for execution from anyone. If this documents  
[sic] are provided I will carry out what ever [sic] is necessary immediately.

29           24.     Thereafter, Ponder sent an email to Hans-Rudolf-Wild stating: "I will have all  
30 documents prepared and email them to you, along with the documents that I sent on April 3rd."

31                     a. Ponder failed to fulfill this pledge.

1           25.     On April 8, 2013, Hans-Peter Wild wired Gunn \$2,100,000.

2           26.     On April 11, 2013, Clauss sent Ponder an email attaching a copy of the Commercial  
3 Register for the Canton of Zug reflecting Ponder's re-appointment as a *direktor* of Casun. The  
4 text of Clauss' email read: "you are back in the game."

5           27.     On April 11, 2013, Ponder requested certain documents regarding the property from  
6 Sibylle Fassbind ("Fassbind").

7           28.     On April 11 and 12, 2013, Fassbind sent emails to Ponder with copies of the title  
8 documents Ponder had requested related to Casun's ownership of the Woodside Property.

9           29.     On April 12, 2013, Ponder forwarded to Gunn the email from Fassbind that  
10 included the grant deed from Calvin Gunn to Casun.

11           30.     Defendants claim that on April 12, 2013, Gunn and Ponder executed a purchase  
12 agreement [Ex. 104] – Gunn on behalf of NVWS and Ponder on behalf of Casun – documenting  
13 Casun's agreement to sell the property to NVWS for \$1,500,000 in cash equivalent.

14           31.     Defendants claim that three days later, on April 15, 2013, Gunn and Ponder  
15 executed a receipt [Ex. 105] – Gunn on behalf of NVWS and Ponder on behalf of Casun –  
16 documenting the delivery of jewelry to Hans-Peter Wild to satisfy the \$1,500,000 purchase price  
17 identified in the purchase agreement.

18           32.     The purchase agreement [Ex. 104] and receipt [Ex. 105] are not credible evidence  
19 of a written contract to transfer the property for consideration.

20                 a.     The documents were created after the purported dates of signing and the parties'  
21                         communications after those dates show that payment had not been received as  
22                         represented by the documents.

23                 b.     However, Casun did not prove by a preponderance of the evidence that Ponder  
24                         and Gunn fabricated those documents to defraud Casun or the court.

25           33.     On April 16, 2013, Hans-Peter Wild sent an email to Ponder identifying \$2,050,000  
26 as the purchase price but stating that he still did not have any details regarding the purchaser or the  
27 account number.

28

1           34.     On April 17, 2013, Ponder executed a grant deed on behalf of Casun and in favor  
2 of NVWS to convey the property.

3           35.     The evidence establishes that the parties—or their representatives or stakeholders:  
4 Ponder, Gunn, Hans-Rudolf Wild, and Hans-Peter Wild—all resided in Switzerland when the  
5 transfer was effected.

6           36.     Despite the representation in Ponder’s email to Hans-Rudolf Wild on April 5, 2013,  
7 that Ponder would “have all documents prepared and email them to [Hans-Rudolf Wild], along  
8 with the documents that [Ponder] sent on April 3<sup>rd</sup>”, Ponder did not provide the NVWS grant deed  
9 to Hans-Rudolf Wild for review and approval before executing the document on behalf of Casun.

10          37.     On April 25, 2013, the grant deed was recorded in the official records of the County  
11 of San Mateo, California, as instrument no. 2013-062730.

12          38.     On July 17, 2013, Hans-Peter Wild sent an email to Gunn and Ponder, stating that  
13 the payment for the property was overdue by weeks and demanding that the money be transferred  
14 within 24 hours.

15          39.     On August 3, 2013, Hans-Peter Wild sent Ponder and Gunn another email  
16 indicating that he had not received the name and contact data of the buyer for the property and had  
17 still not received payment.

18          40.     Ponder responded to that email stating “[t]he name of the purchaser is NVWS  
19 Properties LLC.”

20          41.     On August 6, 2013, Hans-Peter Wild sent an email to Ponder, copied to Gunn, that  
21 provided the bank account number and the wiring instructions for Casun’s bank account. The  
22 email concluded by stating: “[p]lease see to it that the money is wired without any further delay.”

23          42.     Casun conferred a benefit on NVWS by transferring title for the property to it.

24          43.     NVWS appreciated that benefit by holding title for and managing the property.

25          44.     It would be inequitable for NVWS to retain that benefit without paying the  
26 anticipated purchase price of \$2,050,000.

27          45.     There is no evidence that NVWS provided payment to Casun for the property.  
28



1 134 P.3d 111, 116 (Nev. 2006) (“[T]he Second Restatement’s most significant relationship test  
2 governs choice-of-law issues in tort actions unless another, more specific section of the Second  
3 Restatement applies to the particular tort.”)).

4 4. The following sections of the Second Restatement apply to each claim:

5 a. For breach of fiduciary duty, Restatement (Second) Conflicts of Law § 309.

6 i. Under § 309 and the internal affairs doctrine, the place of incorporation  
7 applies: Switzerland.

8 b. For aiding and abetting breach of fiduciary duty and civil conspiracy,  
9 Restatement (Second) Conflicts of Law § 145.

10 i. The place where the injury occurred: Switzerland (a Swiss corporation  
11 was harmed when Ponder executed the NVWS Grant Deed in  
12 Switzerland);

13 ii. The place where the conduct causing the injury occurred: Switzerland  
14 (Ponder executed the NVWS Grant Deed in Switzerland);

15 iii. The domicile of the parties: Switzerland and Nevada; and

16 iv. The place where the relationship between the parties, if any, is centered:  
17 Switzerland.

18 c. For constructive fraud, Restatement (Second) Conflicts of Law § 148(2).

19 i. The place where the plaintiff acted in reliance upon the representations:  
20 Switzerland (the money was wired from Switzerland);

21 ii. The place where the plaintiff received the representations: Switzerland  
22 (the NVWS Grant Deed was executed there and was effective upon  
23 execution);

24 iii. The place where the defendant(s) made the representations:  
25 Switzerland;

26 iv. The domicile of the parties: Switzerland and Nevada; and

27 v. The place where the tangible thing which is the subject of the transaction  
28 is located: California.

1 d. For unjust enrichment, Restatement (Second) Conflicts of Law § 221.

2 i. The place where the relationship between the parties, if any, is centered:

3 Switzerland;

4 ii. The place where the benefit was received: Nevada;

5 iii. The place where the act conferring the benefit or enrichment was  
6 performed: Switzerland (origin of money provided and place where the  
7 NVWS Grant Deed was executed);

8 iv. The domicile of the parties: Switzerland and Nevada; and

9 v. The location of any land or chattel connected to the enrichment:  
10 California.

11 5. “These contacts are to be evaluated according to their relative importance with  
12 respect to the particular issue.” *See* Restatement (Second) Conflicts of Law §§ 145, 148, 221.

13 6. Considering the relevant contacts, Swiss law applies to those claims which arose in  
14 Switzerland—breach of fiduciary duty, aiding and abetting breach of fiduciary duty, constructive  
15 fraud, and civil conspiracy—and Nevada law applies to the claim which arose in Nevada—unjust  
16 enrichment.

17 7. Nevada’s borrowing statute, Nevada Revised Statute 11.020, provides that:

18 When a cause of action has arisen in another state, or in a foreign country, and by  
19 the laws thereof an action thereon cannot there be maintained against a person by  
20 reason of the lapse of time, an action thereon shall not be maintained against the  
person in this State, except in favor of a citizen thereof who has held the cause of  
action from the time it accrued.

21 8. By the date Casun filed this action, December 16, 2016, the statutes of limitations  
22 had not run on any of Casun’s claims under Swiss law.

23 a. The court has taken judicial notice that the statutes of limitations in Switzerland  
24 in April 2013 for breach of fiduciary duty, aiding and abetting breach of  
25 fiduciary duty, constructive fraud, and civil conspiracy were one year from the  
26 date the plaintiff learned of the loss and the identity of the person liable. Swiss  
27 Code: 220 Code of Obligations; Art. 60.  
28



- b. The court has taken judicial notice that, under Swiss law, if the action is derived from an offence for which criminal law envisages a longer limitation period, that longer period also applies to the civil law claim. Federal Act of 30 March 1911 on the Amendment of the Swiss Code: 220 Code of Obligations Art. 60.
- c. The court has taken judicial notice that, under Swiss law, Casun's claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, constructive fraud, and civil conspiracy may also be pursued as criminal charges for fraud and/or criminal mismanagement, punishable by a custodial sentence of up to three years. Swiss Code: 311 Code of Obligations Art. 158.
- d. Under Swiss law, claims for criminal mismanagement punishable by a custodial sentence of three years carry a 10-year statute of limitation. Swiss Code: 311 Code of Obligations Art. 97.
- e. Accordingly, Casun had until August 6, 2023, to bring these claims. Therefore, the claims are not barred by the applicable Swiss statutes of limitations.

9. As Swiss law does not bar Casun's claims, the court applies Nevada's statutes of limitations. *See* Restatement (Second) Conflicts of Law § 142.

10. No equitable tolling applies to the statutes of limitations for Casun's claims.

11. Under Nevada law, Casun's claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and constructive fraud fall under three-year statutes of limitations. *See* NEV. REV. STAT. § 11.190(3).

12. The relevant statutes of limitations begin to run when the damaged party knew or reasonably should have known about the facts giving rise to its claims.

a. As discussed above, Casun reasonably should have known about the facts giving rise to its claims by, at the latest, August 6, 2013.

b. Accordingly, Casun had until August 3, 2016, to bring these claims. Therefore, the claims are barred by the applicable Nevada statutes of limitations.

13. Under Nevada law, Casun's claims for civil conspiracy and unjust enrichment fall under four-year statutes of limitations. *See Siragusa v. Brown*, 114 Nev. 1384, 971 P.2d 801 (Nev.

1 1998); *In re Amerco Derivative Litig.*, 252 P.3d 681, 703 (Nev. 2011); NEV. REV. STATS.  
 2 §§ 11.190(2), 11.220.

3 a. Accordingly, Casun had until August 3, 2017, to bring these claims. Therefore,  
 4 the claims are not barred by the applicable Nevada statutes of limitations.

5 14. In Nevada, a civil conspiracy is established by demonstrating: “(1) the commission  
 6 of an underlying tort; and (2) an agreement between [d]efendants to commit that tort.” *Sharda v.*  
 7 *Sunrise Hosp. & Med. Ctr.*, No. 2:16-cv-2233-JCM-GWF, 2017 WL 2870086, at \*10 (D. Nev.  
 8 July 3, 2017).

9 15. Casun did not prove by a preponderance of the evidence that there was an  
 10 agreement between the defendants to commit any tort.

11 16. In Nevada, a claim for unjust enrichment is established when: (a) the plaintiff  
 12 confers a benefit on the defendant; (b) the defendant appreciates such benefit; and (c) “there is  
 13 acceptance and retention by the defendant of such benefit under circumstances such that it would  
 14 be inequitable for him to retain the benefit without payment of the value thereof.” *Certified Fire*  
 15 *Prot. Inc. v. Precision Constr.*, 283 P.3d 250, 257 (Nev. 2012) (internal quotations omitted).

16 17. Casun proved by a preponderance of the evidence that NVWS is liable for unjust  
 17 enrichment.

18 a. Casun conferred a benefit—title for the property—to NVWS, NVWS  
 19 appreciated that benefit by holding the title for and managing the property, and  
 20 it would be inequitable for NVWS to retain that benefit without payment of the  
 21 anticipated purchase price of \$2,050,000.

22 18. Casun did not prove by a preponderance of the evidence that Gunn is liable for  
 23 unjust enrichment.

24 a. The property was transferred to NVWS, not Gunn.

25 b. There is no evidence that NVWS is Gunn’s alter ego. *See LFC Mktg. Grp., Inc.*  
 26 *v. Loomis*, 8 P.3d 841, 846–47 (Nev. 2000); (ECF No. 230 (dismissing Casun’s  
 27 alter ego claim)).  
 28

1 c. There is no evidence of an enforceable contract obligating Gunn to personally  
2 complete the transfer with the \$2,100,000 that Hans-Peter Wild gave her in  
3 2013. *See* NEV. REV. STATS. §§ 111.210, 111.220(5).

4 19. The court finds in favor of the defendants and against Casun on Casun's claims for  
5 breach of fiduciary duty, aiding and abetting breach of fiduciary duty, constructive fraud, and civil  
6 conspiracy.

7 20. The court finds in favor of Casun and against NVWS on Casun's claim for unjust  
8 enrichment.

9 21. The court finds in favor of Gunn and against Casun on Casun's claim for unjust  
10 enrichment.

11 22. Casun is entitled to a judgment in its favor on its unjust enrichment claim for  
12 compensatory damages in the amount of the reasonable purchase price.

13 23. The reasonable purchase price is the anticipated purchase price of \$2,050,000.

14 24. Defendants are entitled to a judgment in their favor and against Casun on Casun's  
15 claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, constructive  
16 fraud, and civil conspiracy.

17 25. Casun's first and second claims for constructive trust and equitable lien are not  
18 claims for relief, but equitable remedies for its other claims.

19 26. As monetary damages are sufficient to cure Casun's loss for its unjust enrichment  
20 claim, equitable relief in the form of a constructive trust or equitable lien is not warranted.

21 27. Each party is to bear its own costs and fees.

22 **ORDER**

23 Accordingly,

24 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that, consistent with these  
25 findings and conclusions:

26 1. Judgment shall be entered in favor of Casun and against NVWS for unjust enrichment  
27 in the amount of \$2,050,000 in compensatory damages;

28 2. Judgment shall be entered in favor of Gunn and against Casun for unjust enrichment;

- IT IS FURTHER ORDERED that Casun shall prepare and file a proposed judgement consistent with this order and the forgoing findings and conclusions.

James C. Mahan  
UNITED STATES DISTRICT JUDGE